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IN THE

SUPREME COURT OF THE UNITED STATES

JAVIER HERNANDEZ-ANGELES---- Petitioner

v.

JOHN ASHCROFT ATTORNEY GENERAL ---
Respondent

On Petition For A Writ Of Certiorari To
United States Courts Of Appeal, Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. DID THE NINTH CIRCUIT COURT OF APPEAL ERR IN DENYING PETITIONER'S MOTION FOR REVIEW

LIST OF PARTIES

The party in this case is the United States Immigration and Naturalization Service.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] is unpublished.

JURISDICTION

[X] For cases from federal court

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 19, 2004, and a copy of the order denying rehearing appears at Appendix B.

The jurisdiction of this court is invoked under 28 U. S. C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATUTES

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STATEMENT OF THE CASE

Petitioner is a native and citizen of Mexico. He entered the United States without inspection on November 27, 1984. In 1987 he began a relationship with a U.S. citizen, Nancy Miller. Ms. Miller had a child from a previous marriage. He began living with Ms. Miller, moved her and her child to a better home, and began supporting them as a family. On July 25, 1988, the Petitioner and Ms. Miller had a child together named Denise. They continued to live as a family for the next three years until Ms. Miller felt that she could not continue living in this manner without the benefit of marriage. Petitioner did not want to be married so he moved out, due to the tension between himself and Ms. Miller on the issue of marriage. However the Petitioner continued to see his daughter several times per week and to provide at least $200 per month for her support in addition to buying her clothes and other necessary items.

Petitioner loved his daughter very much and shortly after his move obtained a legal decree to protect his visitation rights. Petitioner obtained visitation every weekend, during the week and on vacations. His entire world revolved around working and taking care of Denise, his daughter.

The Petitioner's daughter, Denise grew into a happy and stable young woman. She was an honor student and was very active in school activities. At age fourteen, Denise decided that she wanted to live with her father, the Petitioner, so she could spend more time with him. She moved in with him and began residing there. This arrangement worked well for all the parties.

On April 22, 1998, the Petitioner was suddenly served with an Order To Show Cause to remove him from

the United States. Petitioner was extremely concerned with the emotional hardship that his deportation would cause his daughter, Denise. At his Immigration Hearing the Petitioner admitted the factual allegations and requested relief in the form of Cancellation of Removal pursuant to INA Section 249 A (b).

The Immigration Judge found that the Petitioner met the requirements of continuous physical presence and good moral character. The Immigration Judge found however that the Petitioner did not meet the standard of hardship required for granting of the waiver. The decision of the Immigration Judge was appealed to the Board of Immigration Appeals on September 10, 1998. On April 10,, 2002, the Board of Immigration Appeals dismissed the appeal of Petitioner.

On June 28, 2002, the Petitioner filed a Motion To Reopen and Motion To Remand with the Board presenting new evidence that was not available previously. The Board decided that the Petitioner did not meet the burden required to have his case reopened. The Board directed that the evidence resented was "cumulative," and the only additional evidence was the passage of time.

On October 22, 2002, the Petitioner filed his Petition for Review with the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals denied Petitioner's Motion on August 19, 2004.

The Petitioner now files his Petition for a Writ of Certiorari with the Supreme Court of the United States.

A. THE COURT OF APPEAL ERRED BY FAILING TO GRANT PETITIONER'S MOTION FOR REVIEW

Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. The Chinese Exclusion Case, 130 U.S. 581 (1889), Fong Yue Ting v. United States, 149 U.S. 698, (1893), Knauff v. Shaughnessy, 338 U.S. 537 (1950).

However it is also clear that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to the traditional standards of fairness encompassed in due process of law. The Japanese Immigrant Case, 189 U.S. 186 (1903); Woo Yan Sung v. McGrath, 339 U.S. 33, (1950), Kwong Hai Chew v. Colding 344 U.S. 590, 598, (1953).

In Wong Yang Sung v. McGrath, 339 U.S. 33, (1950), it is stated that "Our law may, and does place more restrictions on the alien then the citizen. But basic fairness in hearing procedure does not vary with the status of the accused. If the procedures used to judge the alien are fair and just, no good reason can be give why they should not be extended to simplify the condemnation of the citizens. If they would be unfair to citizens, we cannot defend fairness of them when applied to the more helpless alien. This is at the root of our holdings that the alien must be given a fair hearing to test an official claim that he is one of a deportable class."

The court in Shaughnessy v. Mezei, 345 U.S. 206 (1953) further elaborated, "The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-

examine witnesses, and to produce evidence in one's own behalf, is especially necessary. The court stated both the old proceedings by which one may be bound to keep the peace, and the newer systems are safeguarded with full rights to judicial hearings for the accused. On the contrary, the Nazi regime in Germany installed a system of "protective custody" by which the arrested could claim no judicial or other hearing process. As a result the country was filled with concentration camps and summary detentions and deportations. Such practices once established with the best of intentions, will drift into the oppression of the disadvantaged in this country as surely as it has elsewhere. Differences in the process of administration make all the difference between a reign of terror and one of law."

It is well-settled that the Fifth Amendment entitles an alien to due process of law in a removal proceedings. Reno v. Flores, 507 U.S. 292, 306, 123 L.Ed.2d, 1, 113 S. CT. (1993); also Felzcerek v. INS, 75 F. 3d 112, 115 (2nd Cir. 1996).

Herein the Petitioner seeks due process by asking for a Stay of Removal pending a review of the merits of his case. Petitioner asserts that due process entitles him to a stay of deportation and a fair hearing on the issues of entitlement to relief from deportation. Denial of review in this instance serves no equitable purpose and serves to punish the Petitioner for the error of the judge in not giving sufficient weight to the equities and hardships that he would face if he was deported to Mexico.

The case of Romero-Morales v. INS, 25 F. 3d 125, 129 (9th Cir. 1994), established that the BIA is required to consider the record as a whole and to review all relevant evidence when deciding a motion to reopen.

Furthermore it is clear that the Petitioner in this matter has had his due process violated in that the BIA dismissed the Petitioner's appeal and inclusion of new evidence by stating that such evidence "amounted to the mere passage of time." This conclusion shows that the BIA failed to make more than even a cursory review which amounts to colorable due process in this context. Larita-Martinez v. INS, 220 F. 3d 1092, 1095-96 (9th Cir. 2000).

Petitions for Review such as the one made by the Petitioner are presently evaluated under the same standards employed by district courts in evaluating motions for preliminary injunctive relief. Lopez v Heckler, 713 F. 2d 1432, 1435, 463 U.S. 1328 (1983). In Lopez it is stated that the petitioner must show either a probability of success on the merits and the possibility of irreparable injury, or that serious legal hardships are raised and the balance of hardships tips sharply in the petitioner's favor. These standards represent the outer extremes of the continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified. Arthurs v. INS, 959 F 2d 142, 143-44 (9th Cir. 1992)

In the case of Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, (1988), the court held that an order by a federal court that relates only to the conduct or progress of litigation by the court ordinarily is not considered an injunction, and therefore is not appealable. However the Supreme Court went on to hold that it will continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have serious and perhaps irreparable consequences

Therefore based on the above decisions it is entirely proper for the court herein to review the denial of Petitioner's stay, and the denial of his appeal to the 9th Circuit because there is a high probability that he can prevail on the merits of his claim. Petitioner can also demonstrate that his daughter will suffer irreparable harm if he is removed from the United States.

Prior to the enactment of the Illegal Immigration Reform Act. the filing of a petition for review automatically stayed a petitioner's deportation pending appellate review in most cases. This has been well stated in the case of De Leon v. INS, 115 F 3d 643, 644, (9th Cir. 1997).

The institution of IIRIRA, 1n 1996, brought immense change to the court's jurisdiction to review final deportation and exclusion orders. The new law established permanent rules that apply to removal proceedings that were initiated against aliens on or after April 1, 1997. As part of the changes made to the petition for review process, IIRIRA eliminated the automatic stay provisions and replaced it with provisions similar to the stay provisions applicable to aliens convicted of an aggravated felony under the old INA. These changes were upheld in the case of Kalaw v. INS, 133 F 3d 1147, 1149 (9th Cir. 1997).

Although the old immigration law provided for an automatic stay when a petition was filed for review, some cases were considered exceptions. Under former INA Section 1252 (f) (2), stays were not automatic in the case of removal proceedings against convicted felons. In Arthurs v. INS, 959 F 2d 142, 143-44 (9th Cir. 1992), a case involving an aggravated felon, it was stated that aliens convicted of an "aggravated felony," within the definition of the INA, were not automatically entitled to a

stay of deportation pending their appeal. For these aliens the court had the discretion to grant a request for a stay of deportation, after evaluating the stay request under the same standards that were applied in the district courts in evaluating a preliminary injunction.

During the evolution of the Immigration and Nationality Act, the case of Artukovoc v. Rison, 784 F 2d 1354, 1355, (9th Cir. 1986), added a further requirement that specified "that the petitioner is required to establish either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of the hardships tips sharply in petitioner's favor."

It has now been clearly established that 8 U.S.C. Section 1252 (f) (2) applies to the grant of a temporary stay for an alien once a decision of removal has been ordered. Maldonado v. Fasno, 67 F. Supp. 2d 1170, 1175. 1175 (S.D.Cal. 1999). Under Section 1252 (f) (2) it is stated that; " A final order for removal cannot be stayed "unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." The terms "clear and convincing," have been held as an intermediate standard, not as high as that of proof "beyond a reasonable doubt," but higher than a "preponderance of evidence." United States v. Meza-Soria, 935 F. 2d. 166, 169, (9th Cir. 1991).

With respect to factual challenges, Section 1252 (f) (2) requires that the alien establish that the order or removal was "manifestly contrary to law." In Dickinson v. Zurko, 527 U.S. 150, 155 (1999), "manifest" was described as something that is apparent, obvious, clear, or undisputable

REASONS FOR GRANTING THE WRIT

The United States Code Section 1254 (a) (1) provides that the Attorney General may cancel the deportation of an alien where such alien: "Is deportable under any law of the United States...; has been physically present in the United States for a continuous period of ten years immediately preceding the date of such application, and proves that during all of such period he was, and is, a person of good moral character; and is a person whose deportation would in the opinion of the Attorney General, result in extreme hardship to his spouse, parent or child, who is a citizen of the United States, or an alien lawfully admitted for permanent residence."

In the case at hand Petitioner has established twenty years of continuous presence in the United States. Petitioner entered the United States in 1984 and was served with an Order To Show Cause on April 22, 1998. This period extends beyond ten years in compliance with INA Section 244 (b) (2). Since Petitioner never left the United States there was no break in his continuous physical presence. The Immigration Judge agreed that the Petitioner met the requirement for continuous presence in the United States for the requisite period.

The Act also states that the person applying for relief must be of good moral character, both statutorily, and in the exercise of discretion. The Petitioner has never been arrested or convicted of a crime as evidenced by his own testimony and documentary evidence or record. The Immigration Judge found that the Petitioner met the requirements of good moral character.

However, The 9th Circuit Court of Appeals erred in supporting the Immigration Judge's finding that the

Petitioner did not establish extreme hardship as required by the Act.

Many factors must be taken into consideration in making a determination of extreme hardship. All factual data and relevant facts presented must be completely analyzed.

"Failure to consider any of the facts presented constitutes an abuse of discretion" In making its determination, the court should look at: "age of the subjects, family ties in the U.S. and abroad; length of residency in the U.S. conditions of health, conditions in the country to which the alien is returnable, economic, political, and financial status, business and occupation, the possibility of other means of adjustment, whether of special assistance to the U.S. or the community, and immigration history. "In making this determination, relevant factors though not determinative in themselves must be considered in the aggregate in determining whether extreme hardship exists." Salamenda v. INS, 70 F. 3d 447 (7th Cir. 1995).

The 9th Circuit Court of Appeal erred and abused its discretion in supporting the position of the BIA that the new evidence presented by the Petitioner was "cumulative." Petitioner showed through his presentation of expert medical opinion that his daughter would need psychiatric counseling if the bond she had with her father was broken by his removal. Expert medical opinion established that Denise, the Petitioner's daughter, age sixteen, who has had an excellent relationship with her father since birth, would be affected emotionally and sustain damaging effects on her development if her father were removed and their home was broken up.

Separation from family and children may be considered the most extreme form of hardship. Bastides v. Immigration and Naturalization Service. 609 F.2d 101 (1979), established that emotional issues must be considered factors in determining hardship. In that instance the court failed to recognize emotional hardship which would result from separation of the alien who expressed deep affection for his child, and who had been shown to have acted consistently with his expression of affection. Therein insufficient consideration was given to non-economic hardship which would result from the alien's deportation. Thus remand was required.

Historically the court has ruled that family and relationships between family members occupies a place of central importance in our nation's history and are a fundamental part of the values that underlie our society. Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977).

Additionally the court in Urbano de Malaluan v. Immigration and Naturalization Service, 577 F. 2d 589 (9th Cir. 1978), reversed an order of the Board of Immigration Appeals denying a motion to reopen proceedings, emphasizing that the "separation of the petitioner from members of her family who are United States citizens must be considered in conjunction with economic detriment in reaching the eligibility decision."

In Wang v. Immigration and Naturalization Service, 622 F.2d 1341 (1980), the court reasoned that the minor children of the Wangs , who have spent their whole lives in the United States, may suffer potential hardship if they were forced to leave this country. Accordingly the court held that the Board should not have summarily dismissed the Wang's claim of hardship to their children. It was held that the effect that the deportation of the

parents would have on the Wang children should be determined only after a hearing.

In Ramirez-Gonzalea v. INS, 794F. 2d 491 (9th Cir 1986), and in Carnalla-Munoz v. INS. 627, F 2d 1004 (9th Cir. 1980), the court recognized that "the most important single hardship factor may be the separation of the alien from the family living in the United States. It was further held in Prapavat v. INS, 662F. 2d 561, 563 (9th Cir. 1981), that "Family unity is always an important consideration, " and "Failing to consider the cumulative effect of all relevant factors in a case can also be found to be an abuse of discretion."

Additionally when the Court fails to consider the impact of separation of the parent from the child that can amount to an abuse of discretion on its part. Reyes-Melendrez v. INS, --F. 3d—2003 WL 22053448 , (9th Cir.Sep. 4, 2003).

Other new evidence presented by the Petitioner, which was not considered and evaluated, included proof of the purchase of his own home, where he resides with his daughter, and his tax returns that clearly show a strong work history and income potential. Additionally the Petitioner demonstrated that since his initial application and hearing, he had acquired his own flooring business, which grossed in at a high profit margin, and that he was now responsible for giving gainful employment to other individuals. Petitioner continues to pay income taxes and to contribute toward the growth and prosperity of this country, while caring for his daughter, who is also thriving in this environment. The failure of the Court to review and consider this evidence established that it did not act on evidence that was reasonable, substantial and probative.

An abuse of discretion on the part of a reviewing Court must create a situation in which the abuse negatively and distinctly impacts the outcome of the case. Rejection of all evidence presented, without carefully analyzing all of it effectively terminates an alien's ability to obtain a favorable outcome. If the Court without thoughtful review of the Board's decision allows the dismissal of all evidence presented, any apply alien can fail to meet the requisite standard for hardship. While the Court is vested with authority and discretion, it must be exercised wisely and in a manner that assures that aliens who are before it are able to receive a full and fair review of their cases. This is becoming more important since fewer and fewer forms of judicial review are available under the present immigration laws.

When strong evidence is presented and yet disregarded, this goes directly to the merits of the case and is clearly an incorrect decision. When there is no justification for rejection of evidence, an abuse of discretion is likely present.

Herein the conduct of the reviewing Court denotes the rise of a colorable constitutional claim. The Court found in Chavez-Murillo v. INS,1999 WL 728521 (9th Cir. 1999) that the Congressional intent to preclude judicial review of constitutional claims must be clearly evidenced. When the Board initially made a decision that the evidence presented was merely cumulative, it suggests that the Board failed to consider and evaluate the evidence in its entirety. This amounts to a failure of due process, raising an issue of a colorable constitutional claim. The Petitioner and his daughter would suffer extreme hardship financially if he was forced to return to Mexico. The Petitioner would be separated from his daughter, Denise, as she would remain in the United States due to her familiarity and acculturation. The Petitioner has no family

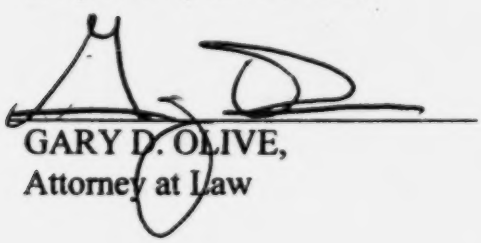
Petitioner would be separated from his daughter, Denise, as she would remain in the United States due to her familiarity and acculturation. The Petitioner has no family ties in Mexico and would have no financial means to support Denise once he was deported and would not be able to come to the U.S. to visit her. Additionally Denise would not be able to see him due to the distance and cost.

CONCLUSION

Petitioner, through his counsel, contends that the Ninth Circuit Court of Appeals erred in denying his Motion to Reopen and that this denial was manifestly contrary to law. Based upon the aforementioned, Petitioner respectfully requests that this Honorable Court grant the Writ of Certiorari, and permit his case to be reopened and remanded so that he can present his application for relief from removal before the Immigration Court.

Dated: October 12, 2004

Respectfully Submitted,



GARY D. OLIVE,
Attorney at Law

Aug 19 2004
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAVIER HERNANDEZ-ANGELES Petitioner, v. JOHN ASHCROFT, Attorney General, Respondent.	No. 02-73-470 Agency No. A90-884-108 MEMORANDUM

On Petition for Review of an Order of the Board of Immigration Appeals

Argued and Submitted August 12, 2004
San Francisco, California

Before:HAWKINS, THOMAS, and BEA, Circuit Judges.

Javier Hernandez-Angeles, ("Hernandez) petitions for review of the Board of Immigration Appeals ("BIA") denial of his motion to reopen his application for cancellation of removal. We have jurisdiction to review the motion to reopen even

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3, where the underlying relief sought is discretionary. See e.g. Medina-Morales v. Ashcroft, 371 F.3d 520, 526-27 (9th Cir. 2004).

APPENDIX A

The BIA properly identified and weighed the new evidence submitted with the motion to reopen, determining that the evidence was not substantially different from the original evidence presented, and would not likely change the result. See Arrozal v. INS, 159 F 3d 429, 432-33 (9th Cir. 1998). It cannot be said that this determination was "arbitrary, irrational, or contrary to law." requiring our reversal. Singh v. INS, 295 F 3d 1037, 1039 (9th Cir. 2002), cert denied, 539 U.S. 941 (2003).

Hernandez's due process claim also fails. Although it is true that the BIA is required to consider the record as a whole and to review all relevant evidence when deciding a motion to reopen, Romero-Morales v. INS, 25 F. 3d 125, 129 (9th Cir. 1994), a petitioner must show substantially more than just a "cursory review" of the evidence or a "mischaracterization of the evidence" in order to mount a colorable due process claim in this context. See Larita-Martinez v. INS, 220 F. 3d 1092, 1095-96 (9th Cir. 2000).

PETITION DENIED

APPENDIX A

U.S. Department of Justice **Decision of the Board of Immigration Appeals**
Executive Office of Immigration Review

Falls Church, Virginia 22041

Date: SEP 24 2002

File: A90 884 108 – San Diego

In re: JAVIER HERNANDEZ-ANGELES

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Nora E. Milner, Esquire

ON BEHALF OF SERVICE: Olga El-Bogdadi
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. Section 1182(a)(6)(A)(i)

APPLICATION: Reopening, cancellation of removal under section 240A(b)

ORDER:

PER CURIAM. This case was last heard before us on April 10, 2002, when we dismissed the respondent's appeal of the Immigration Judge's August 18, 1998, decision denying the respondent's application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. Section 1229b(b). On July 1, 2002, the respondent filed a motion

to reopen contending that new evidence affecting the hardship that his United States citizen child would face warrants reopening of proceedings. The motion to reopen is denied.

The Board ordinarily will not consider a discretionary grant of a motion to reopen unless the moving party meets a "heavy burden" and presents evidence of such a nature that if proceedings before the Immigration Judge were reopened, the evidence would likely change the result in this case. *See Matter of Coelho*, 20I&N Dec. 464 (BIA 1992). Moreover a motion to reopen must, among other things, state the new facts to be considered at the reopening hearing and must be supported by affidavits and other evidence. See 8 C.F.R. Section 3.2© (2002). Such a motion may not be granted unless the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. *Id.* an alien must establish prima facie eligibility for the relief sought before a motion to reopen will be granted. *See Matter of Gutierrez,* 21 I&N Dec. 479, 482 (BIA 1996).

In this case, the respondent's motion to reopen is predicated on his assertion that his separation from his now 14-year old United States citizen child would result in exceptional and extremely unusual hardship to his daughter. In this regard, the respondent maintains that if he were ordered removed to Mexico, his daughter would not accompany him there. He further claims that this separation would impact upon his daughter emotionally and developmentally, particularly given the additional passage of time sine the hearing below, as she has grown more emotionally dependent on his than ever before. In addition the respondent asserts that his removal would adversely affect his ability to provide for his daughter financially. We are not unsympathetic to the effect that the

respondent's enforced departure will have on his daughter, but the eligibility requirements for cancellation of removal under section 240 A(b) require even more than a showing of extreme hardship to his daughter. The additional information proffered by the respondent in this motion is largely cumulative of the evidence in the record.

Indeed, with the exception of the passage of time, we find that the new evidence brought by the respondent in support of this motion is not significantly different form the evidence presented at this hearing regarding the hardship his departure will cause his daughter.

Under such circumstances, we do not find that the respondent has met the "heavy burden" required to satisfy us that reopened proceedings before the Immigration Judge are warranted. *See Matter of Coelho, supra.*

Accordingly, the motion to reopen is denied.

"s/_____"
FOR THE BOARD

8 U.S.C. Section 1254 (a) (1)

(a) Granting of status

(1) In general- In the case of an alien who is a national of a foreign state
Designated under subsection (B) (or in the case of an alien having no nationality, is a person who last habitually resided in such a designated state) and who meets the requirements of subsection (c), the Attorney General, in accordance with this section-

(A) May grant the alien temporary protected status in the United States and shall not remove the alien form the United States during the period which such status is in effect.

(b) Designations

(1) The Attorney General, after consultation with appropriate agencies of the Government may designate any foreign state (or any part of such foreign state) under this subsection only if-

(A) The Attorney General feels there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to that part of that state) would pose a serious threat to their personal safety.

INA Section 244 (b) (2)

"A brief, casual, and innocent departure from the U.S. that is not meaningfully disruptive does not break seven years continuous presence requirement."